

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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NOV 10 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Implementation of Section 309(j)
of the Communications Act
Competitive Bidding

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PP Docket No. 93-253

COMMENTS OF CENTURY COMMUNICATIONS CORPORATION

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SUMMARY

The Commission should utilize competitive bidding to award mutually exclusive licenses for DBS. DBS is intended to provide transmissions directly to the public for compensation, and thus the Act clearly authorizes the use of competitive bidding to select among mutually exclusive DBS applicants. Thus far, the Commission has been able to award DBS construction permits on a first-come, first-served basis, without the necessity of mutually exclusive applications. However, with only a few unassigned DBS frequencies remaining, it is inevitable that DBS operators will file mutually exclusive applications. As either a common carrier or non-common carrier offering, DBS satisfies the Commission's requirements for allocation through competitive bidding. As a non-common carrier, the DBS licensee would obviously deliver transmissions directly to subscribing members of the public. As a common carrier, the DBS licensee would also be in the business of reselling spectrum to its customers for hire. Moreover, DBS service shares many similarities with MMDS and cellular service, which the Commission has proposed to be subject to competitive bidding.

For CARS service, however, it would be inappropriate to award licenses through competitive bidding. According to the Act, auctions only apply to licenses for spectrum where the licensee transmits communications signals over the spectrum which are received directly by subscribers for compensation. CARS technology is not used in this manner. In fact, Commission

regulations limit CARS service in such a way as to prohibit direct transmission to the public.

CARS licenses should also be exempt from auctions because of their function as a private service. As a private service, CARS facilities internally relay signals within a cable system rather than transmit directly to the public. Moreover, the fact that CARS frequencies are significantly shared with Television Auxiliary Broadcast stations represents an additional reason why auctions should not apply to CARS.

Allocating CARS licenses through competitive bidding would also not serve the public interest. Auctions would not encourage the development and rapid deployment of CARS technology. There is no significant backlog in processing CARS applications and such licenses are granted in a fairly routine manner.

Auctions for CARS licenses would also not serve the public interest of "promoting economic opportunity and competition" by "avoiding excessive concentration of licenses." Because all CARS applicants are being accommodated, excessive concentration has not been a problem.

Auctions would also not avoid "unjust enrichment" of licensees and instead allow the sale of the spectrum to benefit the public treasury. Such a consideration is aimed at addressing the Commission's general concerns of license trafficking and profiteering. There is no evidence of trafficking or unjust enrichment through the sale of CARS licenses.

Finally, allocating CARS licenses through competitive bidding will not work to promote efficient and intensive use of the electromagnetic spectrum. The Commission's current application procedures for CARS licenses efficiently allocates the spectrum to all potential users through sound engineering practices. Existing procedures have had the desired effect of avoiding mutually exclusive applications.

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COMMENTS OF CENTURY COMMUNICATIONS CORPORATION

Century Communications Corporation ("Century") hereby submits the following comments in response to the Commission's Notice of Proposed Rulemaking in PP Docket No. 93-253 ("Notice"). Century operates cable television systems serving over 900,000 subscribers in 55 cable systems in 24 states and Puerto Rico. Century holds numerous licenses in the Cable Television Relay Service ("CARS") in connection with its cable television operations. Century is also the majority shareholder of Centennial Cellular, which holds numerous cellular telephone licenses. Accordingly, Century has a direct interest in the issues addressed in the Commission's Notice.

I. THE COMMISSION SHOULD RULE THAT COMPETITIVE
BIDDING APPLIES TO DBS

The Notice seeks comments regarding implementation of the Commission's authority pursuant to the Omnibus Budget Reconciliation Act of 1993, which added a new Section 309(j) to the Communications Act of 1934, as amended, 47 U.S.C. §151 et seq. ("Act"). Section 309(j) authorizes the Commission, under specified conditions, to employ competitive bidding procedures to choose from among two or more mutually exclusive applications for initial licenses in certain classes of service.

At paragraph 23 of the Notice, the Commission seeks comment on whether competitive bidding should be used to award mutually exclusive applications for licenses in the Direct Broadcast Satellite ("DBS") service. The decreasing number of unassigned DBS frequencies coupled with the character of DBS service dictate that the Commission should require competitive bidding for mutually exclusive DBS frequency applications.

A. A Dwindling Supply of Unassigned DBS Frequencies Makes
Mutually Exclusive Applications Inevitable.

Pursuant to Section 309(j)(1) of the Act, competitive bidding is only relevant when "mutually exclusive applications are accepted for filing for any initial license or construction permit" To date, the Commission has been able to award DBS construction permits on a first-come, first-served basis, without the necessity of resolving mutually exclusive applications. Thus far, the Commission has issued none construction permits for DBS licenses, although none are yet in

operation.¹ The Commission needs to confront the reality, however, that available DBS channels are becoming scarce. There are few unassigned orbits and channels left on the DBS horizon. Thus, there is a high probability that mutually exclusive applications may be filed for many of the few remaining DBS orbital slots. Any such mutually exclusive applications should be awarded through competitive bidding.

Under international treaties, the United States has eight orbital positions for DBS satellite service.² Each orbital position has 32 channels. Because the Commission has determined to allocate DBS orbital positions and channels in east-west pairs, 128 channels are available for DBS service to the entire United States. Seventy-seven percent of the available channels (198 out of the total 256) have already been assigned by the Commission. These include:

¹ Notice of Proposed Rulemaking, MM Docket No. 93-25, FCC 93-91 (released March 2, 1993) at ¶ 3.

² Continental Satellite Corp., 66 RR 2d 1885, 1886 (1989).

<u>Permittee</u>	<u># of Authorized Channel Pairs</u>	<u>Assigned Eastern Channels</u>	<u>Assigned Western Channels</u>
USSB ³	8	8	8
Hughes ⁴	27	27	27
Advanced ⁵	27	27	24
EchoStar ⁶	11	11	*
Tempo ⁷	11	11	11
DBSC ⁸	11	11	11
DirectSat ⁹	11	11	11
	Totals	106	92

The Commission is currently evaluating EchoStar's due diligence showing for the assignment of its remaining 11 channel assignments in the western orbital positions. The Commission is also determining if three remaining channel assignments for Advanced similarly satisfy a due diligence showing. If the Commission approves EchoStar's and Advanced remaining assignments, then 83 percent (212 out of 256) of available DBS channels will be taken.

In addition, two other parties have received conditional construction permits but have not yet been assigned orbital positions and channels. These include:

³United States Satellite Broadcasting Co., Inc.

⁴Hughes Communications Galaxy, Inc.

⁵Advanced Communications Corp.

⁶EchoStar Satellite Corp.

⁷Tempo Satellite, Inc.

⁸Direct Broadcast Satellite Corp. (adopted 11/3/93)

⁹DirectSat Corp. (adopted 11/3/93)

Continental Satellite Corp.	11 pairs of channels
Dominion Video Satellite, Inc.	8 pairs of channels

If these additional two parties receive assignments for the number of channels (total of 38) they are authorized to provide, then 98 percent of the available DBS channels (250 out of 256 channels) will be taken. In its deliberations relating to the use of competitive bidding, the Commission must acknowledge the increasing scarcity of DBS allocations.

A recent Commission decision, Dominion Video Satellite, Inc. ("Dominion"),¹⁰ highlights the growing competition for DBS channels. In Dominion, the Commission moved Dominion to the back of the line (behind DirectSat Corp., Direct Broadcast Satellite Corp., and Continental Satellite Corp.) for orbital assignments because the company had failed to comply with the Commission's due diligence requirement by not filing complete details of a satellite construction contract with GE Astro.¹¹ As a result, the Commission denied Dominion the continued reservation of channels at orbital position 119°W, as the company had vigorously insisted. The dwindling supply of unassigned orbit positions and

¹⁰Memorandum Opinion and Order, DBS 92-01MP, FCC 93-430, adopted August 31, 1993, released September 13, 1993.

¹¹The Commission will grant a DBS construction permit on the condition that the permittee proceeds with "due diligence" to build the DBS system. The first component of the "due diligence" test, which Dominion failed, requires that the DBS permittee must begin construction or complete contracting for the construction of its satellite within one year following the grant of the permit. Dominion, slip op. at 1.

channels will only make cases such as Dominion more likely in the future.

The current scarcity of available DBS assignments is all the more acute when it is recognized that no successful full power DBS service is yet in operation. Should the technical and economic viability of DBS be documented in the competitive marketplace, a veritable stampede of DBS license applicants can be expected. The Commission should adopt auction procedures for DBS at the earliest practical time in anticipation of this eventuality, rather than after a backlog of mutually exclusive DBS applications develops.

The Commission asks Commenters to note that DBS construction permits have been issued and that several permittees have received transponder assignments.¹² However, the mere fact that some DBS construction permits may have been awarded previously provides no basis for declining to use competitive bidding to award DBS licenses in the future. It is important to recognize that some of the DBS permittees either may not receive orbital assignments or may have their permits cancelled. Some current DBS permittees may never successfully implement their satellite systems, given the enormous cost and time needed to complete the approved projects.¹³

¹² Notice at ¶ 23, n. 6.

¹³ See, e.g., RCA American Communications, Inc., 62 RR 2d 557 (1987).

If current DBS permittees fall by the wayside, competing DBS interests may take the opportunity to file mutually exclusive applications for desirable orbital assignments and channels. The Commission should acknowledge the uncertainty of existing DBS permittees in a manner similar to its discussion in the Notice, where the Commission recognized that some 220 Mhz Local licenses may not be awarded or might in fact be cancelled.¹⁴ The same rationale for implementing auction procedures for potential mutually exclusive applications in the 220 Mhz band applies to DBS.

In its Notice, the Commission recognizes the eventual need to include certain common carrier radio services within the scheme of competitive bidding should applications become mutually exclusive. For example, the Commission proposes to subject applications for non-voice, non-geo-stationary (NVNG) mobile satellite service (MSS) to competitive bidding should they become mutually exclusive in the future.¹⁵ Similarly, the Commission should identify DBS as a service whose spectrum will be awarded by auction in the event mutually exclusive applications are filed.

B. DBS Service Satisfies the Commission's Requirements for Allocation Through Competitive Bidding.

Competitive bidding should apply to DBS services. Pursuant to Section 309(j)(2)(A) of the Act, the Commission has the

¹⁴Notice at ¶ 132, n. 122.

¹⁵Notice at ¶ 156.

authority to employ competitive bidding where the principal use of the spectrum involves the licensee receiving compensation directly from subscribers and the subscribers receive signals that are transmitted using frequencies on which the licensee is licensed to operate. In paragraph 23 of the Notice, the Commission recognizes that the Conference Report "makes clear that traditional over-the-air broadcast services would not be subject to competitive bidding (there being no subscriber fee)." In the same paragraph, the Notice goes on to inquire whether other mass media services such as DBS should be subject to competitive bidding. The fact that DBS may be classified as a mass media service, however, provides no basis for exemption from competitive bidding. Unlike traditional over-the-air broadcast services, DBS service is expected to provide transmissions to subscribers in return for compensation. Thus, DBS falls squarely within the scope of Section 309(j)(2)(A) of the Act.

Century understands that a DBS licensee may either operate in a common carrier mode, whereby transponder space is leased to third parties for the transmission of signals to the public, or in a non-common carrier mode as a "broadcaster," whereby the DBS licensee may itself distribute video programming or other communications services directly to the public.¹⁶ In either

¹⁶ Inquiry into the development of regulatory policy in regard to Direct Broadcast Satellites for the period following the 1983 Regional Administrative Radio Conference, Gen. Docket No. 80-603, 51 RR 2d 1341, 1366-67 (1982); Notice of Proposed Rulemaking, MM Docket No. 93-25, supra, at ¶ 7.

event, auctions are appropriate for the award of mutually exclusive DBS licenses.

DBS operators offering programming services in a non-common carrier capacity will receive compensation directly from their subscribers. In addition, subscribers of DBS service will receive signals that are transmitted using frequencies on which the DBS permittee is licensed to operate. As a result, the Commission should allocate DBS spectrum through competitive bidding if mutually exclusive applications are received.

Even if DBS operates in a common carrier capacity, DBS spectrum should be allocated by auctions. As the Commission notes, "[t]raditional common carriers have subscribers: by definition their services are offered indifferently to the public for hire."¹⁷ Accordingly, the Commission has proposed that numerous common carrier radio services will be subject to competitive bidding for the resolution of mutually exclusive applications.¹⁸ Thus, DBS spectrum should be similarly subject to competitive bidding even where the DBS licensee elects to operate in a common carrier mode.

Congress has voiced its intent to apply competitive bidding to uses that involve the constructive resale of spectrum. The House Report accompanying the Omnibus Budget Reconciliation Act of 1993 states that Section 309(j)(2) competitive bidding applies to services "where the Commission determines that the principal

¹⁷ Notice at ¶ 26.

¹⁸ See Notice at ¶¶ 147-166.

use of the spectrum will be to, in essence, resell the spectrum to subscribers."¹⁹ DBS service as a common carrier offering is encompassed by this definition because DBS operators will be using the spectrum in a way that is ultimately resold to subscribers. Consequently, the allocation of DBS spectrum should be determined through competitive bidding.

In its Notice, the Commission states its intention to use competitive bidding for technologies similar to DBS. The Commission currently proposes employing auctions to allocate spectrum to Multichannel Multipoint Distribution Service ("MMDS") because MMDS typically provides video programming to subscribers for compensation.²⁰ This is precisely the same function DBS is expected to serve: the provision of programming directly to subscribers. Moreover, like DBS licensees, MMDS licensees have discretion to operate either in a common carrier or non-common carrier mode.²¹

As a common carrier offering, DBS service additionally shares similarities with cellular service, also proposed by the Commission to be subject to competitive bidding. When operating as a common carrier, DBS operates in a manner similar to cellular, allowing subscribers to receive signals using frequencies on which the licensee may operate. Based on its similarities with MMDS and cellular service, the Commission

¹⁹ H.R. Rep. No. 103-111 at 253.

²⁰ Notice at ¶ 150.

²¹ 47 C.F.R. § 21.903(b).

should rule that DBS service is also subject to competitive bidding.

II. AUCTIONS ARE INAPPROPRIATE FOR THE AWARD OF CARS LICENSES

Century submits that Congress did not intend for auctions to apply to licenses issued by the FCC in the CARS service.

Moreover, an analysis of the statutory factors adopted by Congress clearly demonstrates that the use of auctions to award CARS licenses would not serve the public interest.

A. Section 309(j)(2)(A) Precludes the Use of Auctions to Award CARS Licenses.

At footnote 11 of the Notice, the Commission seems to conclude that CARS licenses should be subject to auctions merely because cable television systems have paying subscribers. This superficial analysis ignores the plain language of the Act. Section 309(j)(2)(A) of the Act expressly limits the Commission's authority to award licenses for use of electromagnetic spectrum through competitive bidding to situations where:

- (A) The principal use of such spectrum will involve, or is reasonably likely to involve, the licensee receiving compensation from subscribers in return for which the licensee -
 - (i) enables those subscribers to receive communications signals that are transmitted utilizing frequencies on which the licensee is licensed to operate

In other words, auctions only apply to licenses for spectrum where the licensee uses the facility to transmit communications signals over that spectrum which are received directly by subscribers for compensation.

On the face of the plain statutory language, it is evident that auctions may not be used to award CARS licenses because CARS licensees may not use those facilities to transmit signals directly to the public for compensation. Indeed, pursuant to Section 78.1 of the Commission's rules, the purpose of a CARS license is limited to the relay of television and related signals "from the point of reception to a terminal point from which the signals are distributed to the public by cable." In other words, a CARS licensee is prohibited from transmitting CARS signals for direct reception by the public. Thus, Section 309(j)(2)(A) of the Act precludes the use of auctions for awarding licenses in the CARS service.

The Commission clearly recognizes this crucial distinction in footnote 10 of the Notice:

Contrast such use of the spectrum for these Community Antenna Relay Services (CARS) with so-called "wireless cable" companies, which do use the airwaves to transmit programming directly to subscribers.

The import of this distinction is clear. Auctions are appropriate for MMDS ("wireless cable") licenses because MMDS signals may be transmitted directly to the public. Auctions may not be used to award CARS licenses because CARS signals may not be transmitted directly to the public. This distinction is also highlighted by the following statement in footnote 11 of the Notice:

Commenters should address the extent to which CARS frequencies are used for internal operations for a cable system, and whether such internal uses dictate treatment similar to that proposed, for example, for the Private

Operational Fixed Service frequencies discussed at paras. 30-32, and in Section IV, infra.

In paragraph 30, the Commission notes that a licensee in the Private Operational Fixed Service ("POFS") "may either provide service to itself only or may offer communication service to subscribers for compensation, or may provide service to itself as well as to subscribers." In other words, the Commission's rules provide discretion for a POFS licensee to deliver POFS transmissions for direct receipt by the public for compensation. CARS licensees, on the other hand, are precluded from transmitting CARS signals for receipt by the public. Thus, while auctions may be permissible for the award of POFS licenses, they may not be utilized for awarding CARS licenses.

The mere fact that a cable television operator may use CARS facilities as an intermediate link to transmit television programming "to different points within or among systems" does not provide a basis for application of auctions to CARS licenses since CARS signals may not be transmitted by cable operators "directly to their subscribers."²² Indeed, the application of the "intermediate link" analysis in the CARS context could lead to absurd results. For example, assume that an entity is the licensee of a television broadcast station in community A and also owns a cable television system in community B, well outside the Grade B contour of the television station. Assume this same entity also applies for a television translator in community C,

²² See Notice at ¶ 28.

located somewhere between community A and B. Under the "intermediate link" approach, any mutually exclusive applications for the translator license would be subject to auction if the cable operator intends to pick up the translator signal for distribution to its cable subscribers. Obviously, Congress did not intend such a result.

Century submits that, at least in the CARS context, "intermediate links" are indistinguishable from "private services" which Congress expressly intended to exempt from competitive bidding. As noted at paragraphs 24 and 25 of the Notice, Congress intended the "private service" exception to be broader than the terms "private radio" or "private mobile service" as have been used by the Commission. In particular, Broadcast Auxiliary Services are exempt from auctions because they are used exclusively for the internal relay of signals by the broadcast licensee rather than for direct transmission to the public. CARS stations are functionally indistinguishable from broadcast auxiliary stations. Indeed, they often employ identical facilities and operate on shared frequencies. CARS licenses should therefore be exempt from auctions as private services.

Moreover, the fact that CARS frequencies are significantly shared with Television Auxiliary Broadcast stations provides yet another reason why competitive bidding should not apply to

CARS.²³ As the Commission states in its Notice, frequencies used for intercategory sharing should not be subject to competitive bidding.²⁴ Just as the Commission wants to avoid a situation where police would have to bid against SMRs for access to 800 MHz frequencies, so too should the Commission strive to prevent instances where users of Television Auxiliary Broadcast stations are forced to bid against applicants for CARS licenses.²⁵

B. The Factors Set Forth in Section 309(j)(3) Reveal That Competitive Bidding for CARS Licenses Would Not Serve the Public Interest.

As demonstrated above, Section 309(j)(2)(A) of the Act precludes the use of auctions to award CARS licenses. Assuming arguendo that the Commission had discretion to award mutually exclusive CARS licenses by auction, Section 309(j)(3) of the Act sets forth the factors the Commission is directed to consider in deciding whether to exercise its discretion to award certain classes of licenses through competitive bidding. An analysis of those factors reveals that the public interest would not be served through awarding CARS licenses by auction. Indeed, award of CARS licenses through competitive bidding would contravene important objectives set forth by Congress in Section 309(j)(3).

²³For example, CARS is assigned to the band of frequencies from 12.70 to 13.20 GHz, which it shares with Television Auxiliary Broadcast stations. 47 C.F.R. § 78.18.

²⁴Notice at ¶ 139.

²⁵Notice at ¶ 140.

The first factor to be considered is whether the use of auctions to award a specific class of license would further

the development and rapid deployment of new technologies, products and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays.²⁶

Clearly, Congress intended to allow the Commission to use auctions for services where the Commission's current application processing procedures have resulted in significant backlogs of mutually exclusive applications, thereby delaying the deployment of new technologies and services to the public. Prime examples of such services would be MMDS and cellular, and Congress obviously anticipates a similar demand for PCS frequencies.

However, this first factor has no applicability whatsoever to the CARS service. Unlike services such as MMDS or cellular, there is no evidence that a backlog of mutually exclusive CARS applications has resulted in any delay in the provision of cable service to the public. This is particularly true with regard to service to rural areas, where the CARS band is relatively uncongested. Indeed, it is Century's experience that the Commission does not face a significant backlog in processing CARS applications and that CARS licenses are granted in a fairly routine and expeditious fashion. Moreover, CARS applications are rarely mutually exclusive, if ever.

Pursuant to the second factor, the Commission is directed to determine whether the use of auctions would "promot[e] economic

²⁶ Sec. 309(j)(3)(A).

opportunity and competition" by "avoiding excessive concentration of licenses."²⁷ Again, this factor militates against the use of auctions for the CARS band. As noted above, CARS applications are rarely mutually exclusive, if ever, even though the Commission has issued well over two thousand CARS licenses. Obviously, excessive concentration is not a problem since all applicants are being accommodated. Moreover, CARS licenses are intended to be used by cable television operators. Congress has adopted a statutory provision allowing the Commission to deal directly with any excessive concentration in the cable television industry which may develop in the future.²⁸ Thus, it would be totally redundant for the Commission to attempt to regulate concentration of CARS licenses through the auction process.

The third factor to be considered by the Commission is whether the use of auctions would help avoid "unjust enrichment" of licensees and instead allow "recovery for the public of a portion of the value of the public spectrum resource"²⁹ Obviously, Congress was reacting to reports of trafficking and profiteering in FCC licenses. Again, this concern has no applicability whatsoever in the CARS context. There is absolutely no evidence of trafficking or unjust enrichment through sales of CARS licenses. Indeed, given the strict eligibility requirements for CARS licensees pursuant to Section

²⁷ 47 U.S.C. § 309(j)(3)(B).

²⁸ See 47 U.S.C. § 533(f)(1)(A).

²⁹ 47 U.S.C. § 309(j)(3)(C).

78.13 of the Commission's rules, a cable operator is precluded from selling a CARS license separate and apart from the underlying cable system. Thus, trafficking in CARS licenses is impossible. Moreover, Congress has provided a statutory mechanism to deal directly with potential trafficking in cable television systems.³⁰

The final factor to be considered is whether the use of auctions would promote efficient and intensive use of the electromagnetic spectrum.³¹ The use of auctions to award CARS licenses would contravene this important objective. Under the auction approach, mutually exclusive applications would be resolved by awarding a single license to the highest bidder. This would not promote intensive and efficient use of the spectrum. Rather, the Commission's current CARS application procedures result in far greater spectrum efficiency. Pursuant to Section 78.36 of the Commission's rules, CARS applicants first must perform a frequency coordination to ensure that the proposed facility will not cause interference to an existing or previously applied for facility. Where the frequency coordination indicates the possibility of interference, the applicant is required to "take full advantage of all known techniques, such as geometric arrangement of transmitters and receivers, the use of minimum power required to provide the needed service, and the use of

³⁰ See 47 U.S.C. § 537.

³¹ 47 U.S.C. § 309(j)(3)(D).

highly directive transmitting and receiving antenna systems, to prevent interference" ³²

Not only has this process led to the avoidance of mutually exclusive applications, but it has promoted spectrum efficiency and intensive use by creating a process to accommodate all potential users through sound engineering practices, not just the highest bidder. Indeed, the fact that current CARS application processing procedures have been successful in avoiding mutually exclusive applications is yet another reason why auctions are inappropriate for the CARS band since Section 309(j)(1) of the Act limits the use of auctions to mutually exclusive license applications. ³³

CONCLUSION

For the reasons set forth above, Century urges the Commission to apply auctions to resolve any mutually exclusive applications for licenses in the DBS services. On the other

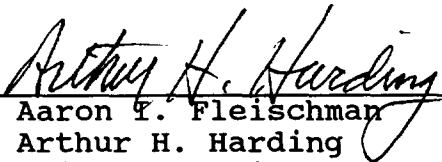
³² See Section 78.19(b) of the Commission's rules.

³³ 47 U.S.C. § 309(j)(1).

hand, the plain language of Section 309(j)(2)(A) of the Act, as well as the public interest factors set forth in Section 309(j)(3), preclude the use of competitive bidding for the award of CARS licenses.

Respectfully submitted,

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